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Trinity County Bank v. Haas (1907) 151 Calif. 553, 91 Pac. 385. Thus it would seem that under a sound interpretation such a power as was given by the mortgage provision in question must be exercised to derive the benefit from it. A mortgage may provide that on default of any payment title is to become absolute or it may provide that the mortgagor may at his option declare the whole amount due and foreclose for it. The court in the instant case seems in error in failing to make any distinction between the two.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INFANTS.—The defendant's servant, while operating an automobile in the course of his employment, negligently ran over and injured the plaintiff's eleven-year-old son, from which injuries the son died. The plaintiff then brought an action for the wrongful death. *Held,* that the plaintiff should not recover, because his son had been guilty of contributory negligence. *Ferrand v. W. H. Cook & Co.* (1919, La.) 83 So. 362.

The plaintiff sued the defendant for an injury to her four-year-old son, caused by the negligent operation of one of the defendant's trains. The defendant endeavored to prove contributory negligence. *Held,* that the plaintiff should recover, because the child could not be guilty of contributory negligence. *Ryan v. Louisiana Ry. & Nav. Co.* (1919, La.) 83 So. 371.

The law of contributory negligence applies equally to infants and adults, except where a child is too young to be capable of exercising judgment or discretion. But the age, judgment, intelligence, and in some cases the experience, of the particular child must be taken into account in determining his negligence. See *Karpeles v. Heine* (1919) 227 N. Y. 74, 124 N. E. 101, 102, (1919) 29 YALE LAW JOURNAL, 234 (effect of employment of an infant on his contributory negligence). It is generally held that a child of six years or under, is incapable of contributory negligence. *Chicago City Ry. v. Tuohy* (1902) 196 Ill. 410, 63 N. E. 997; see *Great Southern R. R. v. Snodgrass* (1918, Ala.) 79 So. 125, 127; *contra, DiMaio v. Yolen Bottling Works* (1919) 93 Conn. 597, 107 Atl. 497. A statute classifying specified acts as contributory negligence in law has been construed to apply to a boy less than seven years of age. *Erie R. R. v. Hilt* (1918) 38 Sup. Ct. 435, (1918) 27 YALE LAW JOURNAL, 1095. Whether or not a child between seven and fourteen years is guilty of contributory negligence is a question of fact for the jury. See *Johnson's Adm. v. Rutland Ry.* (1919, Vt.) 106 Atl. 682, 684. It would seem that a child over fourteen is presumed to be capable of using some degree of reasonable care for his own protection. See *Sherris v. Northern Pac. Ry.* (1918) 175 Pac. 269, 270, 55 Mont. 189, 194. It is submitted that a practical test to determine an infant's contributory negligence is to require the use of that degree of care which would commonly be exercised by the average child of his age, intelligence, and experience. An objective test which is sometimes employed requires of infants that degree of care which is commonly exercised by the average child of his age. *Cf. Roberts v. Ring* (1919, Minn.) 173 N. W. 437; see 1 Shearman & Redfield, *Law of Negligence* (6th ed. 1913) 174. It seems, however, that the subjective test is the better because infants differ so much more than adults in their subjective selves. The instant cases represent the existing law and seem sound. On the doctrine of imputing the parents' negligence to the child, see (1914) 23 YALE LAW JOURNAL, 553; (1915) 24 *ibid.*, 259.

NEGLIGENCE—PHYSICIANS AND SURGEONS—DEGREE OF CARE.—In an action for alleged malpractice in an operation, the court instructed the jury that it was the defendant's duty to exercise such reasonable skill and care as an ordinarily skillful and careful surgeon is accustomed to exercise under like circumstances. The defendant took exceptions to the instruction. *Held,* that the exception

should be overruled, because the instruction fixed a proper standard of care and skill. *Krinard v. Westerman* (1919, Mo.) 216 S. W. 938.

The degree of care and skill required of physicians and surgeons is not the highest possible, but only that which is reasonable and ordinary. *Howard v. Grover* (1848) 28 Me. 97, 48 Am. Dec. 478. Without a special contract they can never be considered as warranting or insuring a cure. *Craig v. Chambers* (1867) 17 Oh. St. 253. That no cure was effected does not raise a presumption of negligence. *Dye v. Corbin* (1906) 59 W. Va. 266, 53 S. E. 147. Nor does an honest mistake or error of judgment in cases of reasonable doubt and uncertainty operate to place physicians and surgeons under a duty to pay damages. *Leighton v. Sargent* (1853) 27 N. H. 460, 59 Am. Dec. 388. But such a duty does arise if injury results from the want of skill as well as from negligence in the application of skill. *Long v. Morrison* (1860 14 Ind. 595, 77 Am. Dec. 72. In determining the standard of care and skill which the law requires, the state of scientific knowledge at the time must be considered. *Bigney v. Fisher* (1904) 26 R. I. 402, 59 Atl. 72; *Kalloch v. Hoagland* (1917, C. C. A. 6th) 239 Fed. 252. The doctrines of his school must also be regarded, if the defendant belongs to one of a number of distinct and differing schools of practice. *Ennis v. Banks* (1917) 95 Wash. 513, 164 Pac. 58 (allopath); *Spead v. Tomlinson* (1904) 73 N. H. 46, 59 Atl. 376 (christian science healer). Within these limitations, the authorities are split on what constitutes ordinary and reasonable care. According to what appears to be the better view it is such care and skill as is possessed generally by members of the profession in similar localities. *Dorris v. Warford* (1907) 124 Ky. 768, 100 S. W. 312. But a respectable number of cases hold that the test is what is ordinary and reasonable care in the same locality or vicinity. *Hesler v. California Hospital Co.* (1918) 178 Calif. 764, 174 Pac. 654; *DeBruine v. Voskuil* (1918) 168 Wis. 104, 169 N. W. 288. The objection to the latter doctrine is that it does not furnish a fair criterion where the medical profession of the particular neighborhood in question is below the average in knowledge, skill, or care. The principal case seems sound in taking the former view and fixing the degree of care as that used "under like circumstances."

PLEADING—LIMITATION OF ACTIONS—AMENDMENTS STATING NEW CAUSE OF ACTION.—The plaintiff brought an action based on a statute for personal injuries. His original petition was filed within the statutory period and alleged ultimate facts which showed that he was engaged in interstate commerce at the time of the injury. After the statutory period had expired, the plaintiff was allowed to amend so as to state a cause of action under the federal Employer's Liability Act. The defendant then moved to strike the amendment upon the ground that it stated a new cause of action, which was barred by the statute of limitations. *Held,* that this motion should be overruled, because the amendment only amplified the allegations of the original petition. *Lammers v. Chicago Great Western Ry.* (1919, Iowa) 175 N. W. 311.

It is generally conceded that an amendment will be considered as filed when the original petition was filed unless a new cause of action is stated. *Birmingham Ry. L. & P. Co. v. Jung* (1909) 161 Ala. 461, 49 So. 434; *United States v. McCord* (1914) 233 U. S. 157, 34 Sup. Ct. 550. But the courts are in hopeless confusion as to when a new cause of action is stated. The majority hold that an amendment states a new cause of action, when it changes the basis of the action from a common-law to a statutory liability, or *vice versa. Union Pacific Ry. v. Wyler* (1895) 158 U. S. 285, 15 Sup. Ct. 877; *Allen v. Tuscarora Valley Ry.* (1910) 229 Pa. 97, 78 Atl. 34. A minority hold that an amendment which shifts from a legal to an equitable remedy, or from tort to contract,